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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NO. _____

SAFE WATER FOUNDATION OF TEXAS, ET AL.,
Appellants

v.

CITY OF HOUSTON,
Appellee

JURISDICTIONAL STATEMENT

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65pp

QUESTION PRESENTED

In light of Amendment XIV, Section 1, of the United States Constitution,—

Does the legislative body of a State, or of a political subdivision of a State, have power to direct that public drinking water be artifically fluoridated, where the ostensible purpose is *not* to make the water potable, and where protesting citizens bring a suit in equity for prohibitory injunction, and therein prove by preponderance of the evidence, to the satisfaction of the trial court expressed in undisturbed findings of fact on the record, that the measure may cause cancer and other serious ailments in man?

N.B., the question here raised is based, not on an abstract claim of privacy or freedom of choice in health matters, but rather on a judicial finding from considerable scientific evidence of the existence of grave environmental danger.

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JURISDICTIONAL STATEMENT

Come now the said appellants, and they show this honorable Court the following particulars, to wit:

I. DECISION BELOW

This appeal is taken from the order of the Texas Supreme Court in Case No. C-2634 on March 21, 1984, refusing reconsideration of a petition for writ of error to review an opinion and judgment of the Texas Court of Appeals for the 1st Supreme Judicial District in Houston in Case No. 01-82-0359-CV on September 22, 1983. The latter determination affirmed the judgment of the District Court of Texas, 151st Judicial District,

in Harris County, Case No. 80-52271, that Houston City Motion No. 80-3500 and Ordinance No. 80-2530 are a constitutional exercise of police power.

II. BASIS OF JURISDICTION

1. This is an appeal from an order (effectively a final decree) of the Texas Supreme Court which lets stand an opinion and judgment of the Texas Court of Appeals sustaining the validity of Houston City Motion No. 80-3500 and Ordinance No. 80-2530 under Amendment XIV, Section 1, of the United States Constitution.

2. The effective date of the order is March 21, 1984.

3. Title 28, United States Code, Section 1257(2), provides,

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the United States Supreme Court as follows: . . . (2) By appeal, where is drawn into question the validity of a statute of any State on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity.

Title 28, United States Code, Section 2106, provides,

> The Supreme Court . . . may affirm, modify, vacate, set aside, or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

4. Appeals must be based on a substantial federal question. *Zucht v. King,* 260 U.S. 174 (1922). This case presents a substantial question of federal constitutional law which concerns the right of citizens to protect, enjoy, and preserve personal health free of an environmental hazard imposed by legislative act, proved by preponderance of scientific evidence in open court, and specifically found to exist by the trial judge on the record.

Among the important reported decisions on which we rely are the following:

— *Griswold v. Connecticut,* 361 U.S. 479 (1965);

— *Meyer v. Nebraska,* 262 U.S. 390 (1923);

— *Paduano v. New York,* 45 Misc. 2d 713, 257 N.Y.S.2d (1965), aff'd 24 App. Div. 2d 437, 260 N.Y.S. 2d 831 (1965), aff'd 17 N.Y.2d 875, 271 N.Y.S.2d 305, 218 N.E.2d 339 (1966), cert. denied 385 U.S. 1026 (1967); and

— *Pure Water Committee v. Yoder,* 6 Ill. App. 3d 659, 286 N.E.2d 155 (1972);

— *Toronto v. Forest Hill,* 9 D.L.R.2d 113 (Canada 1957).

5. The legislative act here in question is Houston City Motion No. 80-3500 and Ordinance No. 80-2530, which impose artificial fluoridation of the public water supply of the municipality. The motion and ordinance were passed by the Houston City Council acting as the legislative body of a political subdivision of the State of Texas, and therefore constitute a "statute of any State" for purposes of 28 U.S.C., § 1257(2).

6. We request that this jurisdictional statement be treated as a petition for writ of certiorari under 28 U.S.C., § 1257(3), to whatever extent such may be necessary to accommodate any technical deficiencies in this appeal not known to us, or to serve the general ends of justice.

III. ISSUE PRESENTED

In light of Amendment XIV, Section 1, of the United States Constitution,—

Does the legislative body of a State, or of a political subdivision of a State, have power to direct that public drinking water be artificially fluoridated, where the ostensible purpose is *not* to make the water potable, and where protesting citizens bring a suit in equity for prohibitory injunction, and therein prove by preponderance of the evidence, to the satisfaction of the trial court expressed in undisturbed findings of fact on the record, that the measure may cause cancer and other serious ailments in man?

N. B., the question here raised is based, not on an abstract claim of privacy or freedom of choice in health matters, but rather on a judicial finding from considerable scientific evidence of the existence of grave environmental danger.

IV. STATEMENT OF THE CASE

On July 8, 1980, and August 12, 1980, respectively, the City Council of Houston, Texas, passed Motion No. 80-3500 and Ordinance No. 80-2530, which direct that the surface water puryeved for public consumption in the municipality be artificially fluoridated.

Shortly thereafter this suit was brought in the District Court of Texas in Harris County for an injunction enjoining the implementation of the motion and ordinance on statutory and constitutional grounds.

The case was initiated by private citizens of Houston against the municipal government. It was established in the trial and appellate courts of Texas that the plaintiffs (appellants here) had standing and a justiciable interest in the controversy.[1] Personal and subject matter jurisdiction were not disputed. Nor was there any requirement of administrative process as a precondition of commencing this suit.

All dilatory pleas having been overruled, the matter came on for trial before Judge Anthony Farris, starting January 13, 1982, and continuing through January 27, 1982. The trial transcript—or "statement of facts" in the parlance of Texas law—shows that eminent doctors testified, and that abundant laboratory, clinical, and epidemiological evidence was received.[2]

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1. This suit was procedurally based neither on 42 U.S.C., Section 1983, nor on any other such statute, but on general principles of the remedial law of Texas under which, "He who seeks to restrain improper or unlawful conduct on the part of public officers must allege sufficient facts to show that he has such an interest in the public welfare as to make him a proper party to prevent the commission of the wrong. It will generally suffice that the persons seeking the injunction are residents and taxpayers." *Caruthers v. Harnett*, 67 Tex. 127, 2 S.W. 523 at 525 (1886). In this case, the Texas Court of Appeals expounded the applicable state law concerning standing and related procedural matters. The only question raised in this appeal, therefore, is one of substantive federal law under the 14th Amendment.

2. In order to enable this Court to appreciate at a glance the nature and extent of the evidence received at trial, lists of the plaintiffs' and the defendant's exhibits introduced in the District Court of Texas are added as Appendices D and E hereof.

On February 22, 1982, Judge Farris held, on the authority of *Houston v. Frank's Auto Parts Co.*, 480 S.W. 2d 774 (Tex. Civ. App. 1972), that the plaintiffs were obligated to do more than prove harm by preponderance of the evidence, i.e., they were obligated to show the City had no rational basis for its legislative act. He found that the plaintiffs failed to carry this burden. Accordingly, he entered an order denying relief and dismissing the suit.

On April 19, 1982, the plaintiffs brought on a motion for new trial, etc., protesting, inter alia, that, as a matter of fundamental law, they were entitled to a prohibitory injunction if they proved harm by preponderance of the evidence. Neither side claimed prejudicial error in the conduct of the trial. The plaintiffs did not allege or seek to prove that any members of the city council in voting for the ordinance had literally acted in an arbitrary and capricious manner.

On May 24, 1982, Judge Farris denied a new trial, but entered findings of fact for the record. He found "that the question of artificial fluoridation is subject to earnest and learned controversy," and that the City Council of Houston relied on a body of respectable medical opinion in good faith. However, Judge Farris also found as fact for the record, on the basis of a preponderance of the evidence adduced at trial, that—

> "artificial fluoridation of public water supplies, such as is contemplated by City Ordinance No. 80-2530, may cause or may contribute to the cause of cancer, genetic damage, intolerant reactions, and chronic toxicity, including dental mottling, in man; that the said artificial fluoridation may aggravate malnutrition and existing illnesses in man; and that the value of said artificial fluoridation is in some doubt as to the reduction of tooth decay in man."

The case was then taken to the Texas Court of Appeals, which affirmed on September 22, 1983, in an opinion by Justice Henry Doyle, who observed:

> [A]ppellants are laboring under the mistaken belief that they must only make proof by a preponderance of the evidence that the injection of fluoride into the city's water system would be harmful. Indeed, this was the quantum of the evidence that the appellants presented, both lay and scientific.

Rehearing was denied by the Texas Court of Appeals on December 8, 1983. A writ of error was refused by the Texas Supreme Court on February 22, 1984 and Rehearing was denied March 21, 1984.

V. REASONS FOR SUSTAINING JURISDICTION

1. An appeal must be allowed where it lies under 28 U.S.C., § 1257(2), and a substantial question of federal constitutional law is presented. Such a question is substantial whenever it is of practical importance, legally difficult, and not clearly resolved by the established precedents of this Court. *Zucht,* 260 U.S. at 176-177.

2. The courts of Texas have held that, under the 14th Amendment, any legislative act which purports to regulate health is valid so long as it has some rational basis. According to this view, if a rational controversy exists, such a regulation is constitutional, and this remains so even where those challenging the law are able to show by preponderance of the evidence in court, including the testimony of learned physicians and scientists, that implementation would be dangerous to human life, i.e.,

may cause cancer, genetic damage, and other such ailments in man.

We believe that this cannot be the highest law of the land.

We believe that the error here is overgeneralization from cases of the post-*Lochner* era on substantive due process. We urge this Court to intervene lest the unfortunate consequences of this misconception continue. A clarification by this Court is urgently needed.

3. In *Lochner v. New York,* 198 U.S. 45 (1905), this Court struck down a statute which placed moderate limits on the working hours of bakers, ostensibly on the basis of an inherent right to contract. This decision was fiercely criticized on the claim that the judiciary had substituted its political judgment for the political judgment of the legislature. Justice Holmes dryly observed, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics." 198 U.S. at 75.

Things took a sharp turn in *Nebbia v. New York,* 291 U.S. 507 (1934), and *West Coast Hotel v. Parrish,* 300 U.S. 379 (1937), which held that freedom to contract is not absolute, and that, in the field of economic affairs and business, where no fundamental privilege and immunity is abridged, a statutory regulation is constitutional, unless it is arbitrary, capricious, and unreasonable, that is, as long as it rests on some arguable or rational basis. We accept this as settled law.

The difficulty arises from unjustifiable expansion of this doctrine as a general test of constitutionality. The term "police power" has come to be a magic incantation

which means "anything goes", regardless of the circumstances, as long as some rational argument can be made in favor of legislative judgment.

The excesses of this approach were identified in *Griswold v. Connecticut,* 381 U.S. 479 (1965), where this Court held unconstitutional a statute which sought to regulate health by making use of contraceptives a criminal offense. Justice Douglas remarked:

> We do not sit as a superlegislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife, and their physician's role in one aspect of their relation.

381 U.S. at 482.

A sphere of unenumerated, yet protected personal rights was sketched. One of the most difficult problems of constitutional law is giving objective legal definition to this area of fundamental liberty which cannot be transgressed even by legislation which was enacted in good faith on a rational basis.

We shall not here presume or attempt to give an exhaustive formula. It is sufficient to note that, in *Griswold v. Connecticut,* 381 U.S. at 481, *Meyer v. Nebraska,* 262 U.S. 390 (1923), was cited with emphasis and approval. In the latter, Justice McReynolds said that the area of personal liberty protected by the 14th Amendment includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," 262 U.S. at 399. Not all rights of freedom at common law have constitutional dimension in this

country. For example, the liberties incident to the common law prohibition of monopolies can be legislatively taken away, for these are not essential to the orderly pursuit of happiness. See Miller, J., in *Slaughterhouse Cases,* 16 Wall 36 at 65-66 (U.S. 1873). On the other hand, the right to protect health from environmental hazards is guaranteed, not only because it fits the definition given by Justice McReynolds, but also because, on pages 125 ff. and 134 of Book I of his *Commentaries of the Laws of England,* Christian Ed. 1765, Blackstone classified the "preservation of a man's health from such practices as may prejudice and annoy it" as among the "absolute rights of individuals." Blackstone considered this right as fundamental as the privilege of the writ of habeas corpus, which he called "the bulwark of the British Constitution." See pages 134-137 of Book I, and page 438 of Book IV of his *Commentaries. Cf.* Alexander Hamilton, *The Federalist,* No. 84, Mentor Ed. 1961, pp. 511-512. See, e.g., *Ex Parte Milligan,* 4 Wall. 2 (U.S. 1866).

Our position in this case is that the appellants, having proved an environmental danger to their health by preponderance of the evidence, are entitled to a prohibitory injunction as a matter of law under the 14th Amendment. We say this, because the imposition of a greater standard of proof than what is ordinarily required in civil litigation[3] is a practical denial of the right of these citizens to protect their health by resort to judicial process. A

3. In *Missouri Pac. Ry. v. Brazil,* 72 Tex. 233, 10 S.W. 403 at 405 (1888), the Texas Supreme Court said, "In civil cases, whatever the issue involved, it is not requisite that a person on whom rests the burden of proof shall establish his cause by a greater weight of evidence than a fair preponderance."

court of justice cannot ascertain ultimate truth, but can assess practical risk in terms of medico-scientific evidence and equitable principles. This necessitates use of the evidentiary standard of fair preponderance, otherwise environmental litigation would be impossible. Equity can and does abate health-threatening public nuisances on evidence far less definitive than what was presented below before the District Court of Texas in Houston. See, e.g., *United States v. Reserve Mining Co.*, 380 F. Supp. 11 (D. Minn. 1974), and 417 F. Supp. 789 (D. Minn. 1976), aff'd. 543 F.2d 1210 (8 Cir. 1976). *Cf. Reserve Mining Co. v. Herbst*, 256 N.W.2d 808 (Minn. 1977), and *Missouri v. Illinois*, 180 U.S. 208 (1900).

It was erroneously believed below that a health regulation which has any arguable basis is constitutional. Yet this cannot be, because, if it were so, a statute prohibiting use of contraceptive pills as a health regulation would be valid, and government could endanger public health on a superficial but arguable pretext. The intervention of this Court is needed to set moderate parameters on the rhetoric of police power in the field of health regulation.

4. Artificial fluoridation is not imposed to make water potable. As stated by Justice Rand of the Supreme Court of Canada in *Toronto v. Forest Hill*, 9 D.L.R.2d 113 at 118 (1957),

> But it is not to promote the ordinary use of water as a physical requisite for the body that fluoridation is proposed. The process has a distinct and different purpose; it is not a means to an end of wholesome water for water's function but to an end of a special

health purpose for which the water supply is made use of as a means.[4]

This measure therefore is not analogous to the problem of compulsory small pox vaccination or water chlorination which are proper because needful to prevent contagious, life-threatening dieases. See, e.g., *Jacobson v. Massachusetts,* 197 U.S. 11 (1904). We submit that a constitutional statute, regardless of subject matter, must at least adopt a tolerable means which is not disproportionate in its ill-consequences to any viable benefits thereby achieved. *Houston & Texas Central Ry. v. Dallas,* 98 Tex. 396, 415-418, 84 S.W. 648 (1905).[5] The *undisturbed findings* on the record below are that artificial fluoridation may cause cancer and other serious ailments, and that the measure is of doubtful value in reducing tooth decay. Surely the 14th Amendment does not permit a state or local government to adopt a regulation which endangers human life and health with cancer, genetic damage, intolerant reactions, chronic toxicity, and ag-

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4. The Supreme Court of Canada therefore held that a statute authorizing municipal laws calculated to produce "pure and wholesome water" for public consumption should not be construed to authorize artificial fluoridation. It is also noteworthy that, in the Safe Drinking Water Act (42 U.S.C., Section 300f et seq.), Congress authorized federal regulations designed to assure safe drinking water throughout the country: yet to stress the difference between regulations for making water potable, and regulations for other purposes, e.g., imposing artificial fluoridation, 42 U.S.C., Section 300g-1(b)(6), says, "No national primary drinking water regulation may require the addition of any substance for preventative health care purposes unrelated to contamination of drinking water."

5. The opinion of this classic case was written by a distinguished jurist who based his analysis largely on decisions of this Court, viz., *Lawton v. Stelle,* 152 U.S. 133 (1894); *Holden v. Hardy,* 169 U.S. 366 (1898); and *Dobbins v. Los Angeles,* 195 U.S. 233 (1904).

gravation of malnutrition, in the doubtful hope that tooth decay may be reduced.

5. Artificial fluoridation per se is not a new problem. *Chapman v. Shreveport,* 225 La. 859, 74 So.2d 142 (1954), *appeal dismissed,* 348 U.S. 892 (1954); *Kraus v. Cleveland,* 163 Ohio St. 559, 127 N.E.2d 605 (1955), *appeal dismissed,* 351 U.S. 935 (1956); *Birnel v. Firecrest,* 53 Wash. 2d 830, 335 P.2d 819 (1959), *appeal dismissed,* 361 U.S. 10 (1959); *Ready v. St. Louis C. W. Co.,* 352 S.W.2d 622 (Mo. 1961), *appeal dismissed,* 371 U.S. 8 (1962); *Canton v. Whitman,* 44 Ohio St. 62, 337 N.E.2d 766 (1975), *appeal dismissed,* 425 U.S. 956 (1976); and *State Board v. Brainerd,* 241 N.W.2d 624 (Minn. 1976), *appeal dismissed,* 429 U.S. 803 (1976). *Cf. De Aryan v. Butler,* 119 Cal. App. 2d 674, 260 Pac. 2d 98 (1953), *cert. denied,* 347 U.S. 1012 (1954); *Dowell v. Tulsa,* 273 Pac. 2d 859 (Okla. 1954), *cert. denied,* 349 U.S. 912 (1955); *Schuringa v. Chicago,* 30 Ill. 2d 504, 198 N.E.2d 326 (1965), *cert. denied,* 379 U.S. 964 (1965); and *Paduano v. New York,* 17 N.Y.2d 875, 218 N.E.2d 339 (1966), *cert. denied,* 385 U.S. 1026 (1967).

In all of the foregoing cases, however, the constitutional challenge was based on abstract claims of privacy or health freedom. In none of them were the appellants or the petitioners successful in securing formal findings of fact of the record, based on a preponderance of concrete evidence in open court, that artificial fluoridation is harmful or dangerous. Precisely such findings, based on precisely such evidence, have been entered on the record of this case. Indeed, the findings are quite spectacular for any kind of modern environmental litigation. *United States v. Reserve Mining Co.,* supra.

It cannot be ignored that, in *Paduano v. New York,* 45 Misc. 2d 718 at 728, 257 N.Y.S.2d 531 (1965), the Supreme Court noted that judicial deference to legislative judgment should be observed, but only "until some proof is adduced that fluoridation has harmful side effects, and therefore is not in the best interests of the community." That case is now presented in this appeal.

In the sense that such evidence has been found to exist on the record below, this case, the difficulty and importance of which are obvious, is a matter of first impression in this Court.

6. We ask this Court to take judicial notice of certain significant developments in the United States and Canada.

This particular litigation is the third of its kind, in which a trial judge has recently heard expert testimony in open court, and found, on the basis of a preponderance of the evidence, that artificial fluoridation poses serious health hazards to the population.

The first was *Aitkenhead v. West View* heard before the Allegheny County Court of Common Pleas, No. GD 4584-78. There Hon. John Flaherty, now Justice of the Pennsylvania Supreme Court, entered findings on November 16, 1978, after a lengthy trial in Pittsburgh, that he was "compellingly convinced" artificial fluoridation causes cancer in man, whereupon he entered a preliminary injunction. While these findings were undisturbed and coram judice—the decree of November 16, 1978, was expressly affirmed against legal challenge in 397 Atl. 2d 878 (Pa. Comwlth. 1979)—, the case was later complicated with problems of subject matter jurisdiction to enter a final decree. See the final appellate disposition in 442 Atl. 2d 364 (Pa. Cmwlth. 1982). It is noteworthy

that the record of the trial in Pittsburgh attracted international attention, and contributed to an executive decision of the government of Quebec to suspend enforcement of the provincial fluoridation law. See Bundock[6] et al., *Fluorides, Fluoridation, and Environmental Quality* (Translation), Environment Ministry of Quebec, Ste-Foy, November, 1979, pp. 128-131 and 188-192. *Cf.* Bundock et al., *Fluorides, Water Fluoridation, and Environmental Quality: the Quebec Experience,* Science and Public Policy (England), June, 1982, pp. 130-140.

The other trial followed the decision of the Appellate Court in Illinois in *Pure Water Committee v. Yoder,* 286 N.E.2d 155 (1972), that allegations of harm from fluoridation based on new evidence not previously considered are actionable on constitutional grounds in an injunction suit. On February 24, 1982, following a lengthy trial in Alton before the Circuit Court of Illinois for Madison County, No. 68-E-128, Judge Ronald Niemann found, on a preponderance of the evidence, that artificial fluoridation presents an environmental danger. In his opinion, Judge Niemann stated, in conformity with our position here, "The plaintiffs' claim of a threat to public health lifts this case out of the political thicket." His injunction decree is now before the Illinois Supreme Court.

Our point in making these references is to show that the record of this Texas case is not an eccentricity: the findings of Judge Farris are part of a growing avalanche of judicial concern in this country. We therefore urge that the moment is ripe for this Court to become involved in this problem. The safety of our environment requires

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6. Benoit Bundock, M.D., F.R.S.H., O.B.E., former Principal Medical Officer of Special Projects for Canada, and currently Senior Adviser to the Environment Minister of Quebec. Dr. Bundock is a member of the Club of Rome.

not only statutory and equitable restraints on the private sector, but the restraints of fundamental law on the public sector as well. The nation needs the guidance of this Court to establish the constitutional standards for this type of litigation.

WHEREFORE, the appellants pray that probable jurisdiction be noted, or in the alternative, that a Writ of Certiorari be granted, and that this cause be set down for written and oral argument on the merits.

Respectfully submitted,

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SYLVIE FORTIN
of the Quebec Bar

SAMUEL G. WEISS, JR.
of the Pennsylvania Bar

PAUL STEPHEN BEEBER
of the New York Bar

* Admitted to the Bar of the Supreme Court of the United States on August 5, 1971

CERTIFICATE OF SERVICE

I hereby certify that a true ond correct copy of the above and foregoing Jurisdictional Statement has been forwarded to Attorneys for Appellee, F. J. Coleman, Jr. and Robert J. Collins, P. O. Box 1562, Houston, Texas 77251, by certified mail, return receipt requested, on this the _____ day of June, 1984.

GRANT KAISER

APPENDIX A

NAMES OF PARTIES

Appellant:

Safe Water Foundation of Texas
Lucile M. Andersen
Myron C. Andersen
Bruno Angst
Myra Angst
J. G. Baier
Mrs. W. H. Baines
Annie Pear Baird
Kenneth H. Baird
Elizabeth Banda
John V. N. Bandy
Valerie Barrera
Carol Bass
Martha Bevis
Lucille Beigel
Pride Black
Bonnie Blackburn
Mrs. Jean S. Bostick
Paul J. Bostick, Jr.
Alice B. Boston
Leonard M. Boston
Myrtle F. Brock
Leeona Brooks
Cecil A. Brown
Harold Ray Brown
Ruth H. Brown
Linda Turner Buchanan
Susan Buechler
B. Edward Burgess
Vera S. Bush
Ernest A. Callenius
Becki Calvert
Marian Camarata
R. H. Camp
Mrs. H. H. Carroll
Madelyn Casper
Michael C. Cassity
Patricia M. Cassity
Mrs. Lou Chafin
Cindy L. Chal
James M. Chal
Mrs. John A. Clendening
John A. Clendening
John E. Cline
Valerie W. Clites
Gertrude Cobb
J. D. Cobb, Jr.
Rosemary A. Coe
Walter L. Coe
Kerry H. Collins
Mrs. P. C. Cronin
Elda Cummings
Margaret Currwan
Elsie Carlson Daniel
Sharon Danilovic
Dana D. Daves, Sr.
Mrs. Daniel F. Davila
Margaret Davila
Randall R. Davis
Selma W. Dawson
R. DeNeefe
Joseph Robert Deshayes
H. C. Dill
Julia T. Dill
Charles R. Douglas
LeNelle Douglas
Paul R. Duplechain
W. J. Eheman
Bertram Ellis
Lilli Elsas
A. V. Emmott
Sarah Emmott
Kathe Evans
John W. Fain
Ed Fall
Malvine Frame
Rex M. Garrett
James E. Geriand
Lois Gettler
Karen Brown Givens
Christa Gortemiller
Eugene V. Greene
Mildred O. Greene
Chlotille C. Grima

Appellants cont'd:

Charlott J. Haight
Margaret S. Hall
J. R. Hammond, D.D.S.
Mrs. Paul M. Hanahen
David C. Hanslik
Barbara E. Hardy
Ruth Harlow
Randy Harper
Karen Sue Henderson
Mrs. Christine Henry
Susan Henson
Gertrude Herd
Robert T. Hill
Daniel R. Hinckley
Charles G. Hooks, III
Sue Ann Hooks
Jacque Howard
S. P. R. Hutchins, M.D.
L. M. Inkley, Jr.
Mrs. Suzanne Inkley
Sheila Jacklyn
Carole Johns
Mrs. Gay W. Johnson
Donna G. Jordan
Allison Joy
Nina C. Joy
Walter T. Keith, Jr.
Coralie R. Kelley
Patricia E. Kendrick
Mrs. Edith P. Kinlde
Jerry I. Koch
W. D. Laird
Jean Lamkin
Jon P. Lewis
Susan Lewis
Mrs. May Lim
Joe Lindley
Jack K. Long
Ruth Yale Long, Ph.D.
Charlotte McGuire
Margaret McMahon
Miss Mildred McTighe
Caroly Mansfield
Kenneth I. Mansfield
John G. Maxey, Jr.
Wanda Meyer
Kathryn C. Mikeska
T. Gene Mikeska
Arthur L. Miller
Dorothy Miller
Don Mitchell, M.D.
David P. Mohle
Tonya Morgan
Mrs. Marie Moynohan
Mrs. Boyd Mullen
Emily Mustacchia
Nancy W. Myers
Sadie May Neeley
A. J. Nitsch
John Nix
Vern Ogden
Harry W. Peters
Patricia A. Peters
Tommy Pettigrew
Peggy Ann Pike
Paul T. Pixley
Amanda Kent Plona
George J. Polk, Sr.
Linda S. Pope
Katherine S. Pulse, D.C.
Edith M. Pulse
George A. Ralls
Marie A. Ralls
L. Ram
Hub Ratliff
Dorothy R. Redding
June Reglen
Joseph A. Reilly
Joe H. Reynolds
Mrs. Joe Reynolds
Ronnie E. Reynolds
Rock A. Riley
Ralph Robbins
N. D. Robinson, D.C.
Trigio Rodriquez
Mrs. J. Dickson Rogers
Michael Rosenberg
Edward W. Russey, Jr., D.D.S.

Appellants cont'd:

Mrs. Lola Scarbrough
Joseph J. Scardino
Mrs. Harry Schieck
Douglas I. Schillings
Ann Schmidt
Edward J. Schmidt
Doris W. Schultz
Frederick K. Scott
Mardel C. Shamback
Trula Sharpe
Fred Simmons
Donald E. Smith
Frank C. Smith, Jr.
Inez Smith
J. Allen
H. Smith, Jr.
Janice Marie Smith
Lorraine Smith
Sophronia Smith
Mrs. Tena R. Smith
Gerry Standefer
Mrs. Georgiana R. Steeg
Kathryn Steffy
William Steffy
Yvonne Steely
Barbara J. Stephens
Curtis E. Stewart
Mrs. W. H. Sullivan
Betty Swihart
Mary A. Thomas
Otis F. Thomas
Peggy Thomas
Randall T. Thomas
Lucy M. Turner
Mrs. Ray W. Turner
Roy A. Underwood
Margaret G. Vick
Norma B. Walters
Alana Jane White
Neva White
Alyce Rayette Wilkerson
Alyne Word
Donald W. Yeager, Sr.
Louise K. Yeager
Pamela L. Young
Percy Young
Raymond H. Young
Helen Young
Mrs. Sue Young
Susan Shawn Young
Mrs. Antone Zvonek

Appellee:

City of Houston

APPENDIX B

MOTION NO. 80-3500

MOTION by Council Member Tinsley that the recommendation of the Director of Public Health relative to fluoridation of drinking water for the City of Houston, be adopted, and that fluoride be added to the drinking water supply so that the portion of the Houston population drinking the water of surface origin will benefit from this proven preventive health measure.

Seconded by Council Member Robinson

ROLL CALL VOTE:
Mayor McConn voting aye
Council Member McKaskle voting no
Council Member McGowen voting no
Council Member Lalor voting aye
Council Member Hall voting aye
Council Member Mancuso voting no
Council Member Goodner voting aye
Council Member Hartung voting aye
Council Member Gorczynski voting aye
Council Member Reyes voting aye
Council Member Westmoreland out of the City on business
Council Member Tinsley voting aye
Council Member Goyen voting aye
Council Member Ford voting aye
Council Member Robinson voting aye
MOTION CARRIED

Passed this 8th day of July, 1980

Approved this 15th day of July, 1980

/s/ JIM McCONN
Mayor of the City of Houston

APPENDIX C

City of Houston Ordinance No. 80-2530

AN ORDINANCE APPROVING AND AUTHORIZING AN APPLICATION TO THE DEPARTMENT OF HEALTH OF THE STATE OF TEXAS FOR FINANCIAL AND TECHNICAL ASSISTANCE UNDER THE FLUORIDATION PROJECT; MAKING VARIOUS FINDINGS AND PROVISIONS RELATING TO THE SUBJECT; AND DECLARING AN EMERGENCY.

* * * *

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON:

Section 1. The City Council hereby approves and authorizes an application to the Department of Health of the State of Texas for financial and technical assistance under the Fluoridation Project, in substantially the form as that which is attached hereto and incorporated herein by this reference. The Mayor (or in the absence of the Mayor, the Mayor Pro Tem) is hereby authorized to execute such application and all related instruments on behalf of the City of Houston. The City Secretary (or, in the absence of the City Secretary, any Assistant City Secretary) is hereby authorized to attest to all such signatures and to affix the City's seal to all such instruments.

Section 2. There exists a public emergency requiring that this Ordinance be passed finally on the date of its introduction; therefore, this Ordinance shall be passed finally on such date and shall take effect immediately upon its passage and approval by the Mayor Pro Tem.

PASSED this 12th day of August, 1980.

APPROVED this 12th day of August, 1980.

/s/ JOHNNY GOYEN
Mayor Pro Tem of the City of
Houston

(Prepared by Legal Dept.
(L. D. File No. 75,000)

/s/ JAMES DUFFY
Assistant City Attorney

(Requested by James L. Sullivan, Acting Director
Department of Public Works)

VOTE — ORDINANCE NO. _____

Aye	No	
Absent - Out of City		Mayor
		Council Members
	√	McKaskle
√		McGowen
√		Lalor
Absent - Out of City		Hall
	√	Mancuso
√		Goodner
√		Hartung
√		Gorczynski
Absent - Out of City		Reyes
Absent - Out of City		Westmoreland
√		Tinsley
√		Pro Tem Residing
		Goyen
√		Ford
Absent - Death in Family		Robinson
Caption		Adopted

Caption Published in Daily Court
Review Aug. 18, 1980

APPENDIX D

SAFE WATER FOUNDATION OF TEXAS V.
CITY OF HOUSTON,
DISTRICT COURT OF TEXAS, HARRIS COUNTY,
151st JUDICIAL DISTRICT, NO. 80-52271

LIST OF PLAINTIFFS' EXHIBITS

Exhibit No. 1 — Enlargement of the Basic Data, Figurge 1 of Exhibit No. 3.

Exhibit No. 2 — Curriculum Vitae of Dr. Dean Burk.

Exhibit No. 3 — Burk and Yiamouyiannis, Fluoridation and Cancer: Age-Dependence of Cancer Mortality Related to Artificial Fluoridation, 10 Fluoride 102 (1977).

Exhibit No. 4 — Calculations for Indirect-Method Adjustment of the Basic Data for Age, Race, and Sex submitted to the British Department of Health and Social Security by Dr. Yiamouyiannis (1980).

Exhibit No. 5 — Burk, Fluoridation-Cancer Linkage in England, 5 Cancer Control Journal 151 (1979).

Exhibit No. 5A — Kinlen, Cancer Incidence in Relation to Fluoride Level in Water Supplies, 138 Brit. Dent. Jour. 221 (1975).

Exhibit No. 6 — Burk, Increased Cancer Mortality Linked with Artificial Fluoridation

of Drinking Water in Large American and British Cities: Year-by-Year Time Trends Compared Immediately Before and After Fluoridation (1981).

Exhibit No. 7A — Bradford-Hill, Principles of Medical Statistics, 9th Ed. 1971, Chapter 17.

Exhibit No. 7B — Hon. James Delaney of New York, remarks and prepared submission entitled "Fluoridation and Cancer," Congressional Record, July 21, 1975, pp. H7173-H7176.

Exhibit No. 7 — Waldbott et al., Fluoridation: the Great Dilemma, Coronado Press, Lawrence Kans., 1978.

Exhibit No. 8 — Rose and Maurier, Environmental Fluorides 1977, NRC of Canada, No. 16081.

Exhibit No. 9 — Taylor, Sodium Fluoride in the Drinking Water of Mice, 60 Dent. Dig. 170 (1954).

Exhibit No. 10 — Herskowitz and Norton, Increased Incidence of Melanotic Tumors in Two Strains of Drosophila Melanogaster Following Treatment with Sodium Fluoride, 48 Genetics 307 (1963).

Exhibit No. 11 — Taylor and Taylor, Effect of Sodium Fluoride on Tumor Growth, 119 Proc. Soc. Exptl. Biol. Med. 252 (1965).

Exhibit No. 12 — Chang, Effect of Fluoride on Nucleotides and Ribouncleic Acid in Germinating Corn Seedling Roots, 43 Plant Physiol. 669 (1968).

Exhibit No. 13 — Mohamed and Chandler, Cytological Effects of Sodium Fluoride on Mice, 15 Fluoride 110 (1982).

Exhibit No. 14 — Klein et al., DNA Reparatur und Umweltschadstoffe, 24 Z. angew. Bäder-u Klimaheilk. 218 (1977).

Exhibit No. 15 — Jackimczak et al., The Effect of Fluoride and Lead Ions on the Chromosomes of Human Leucocytes in Vitro, 19 Gen. Poc. 353 (1978).

Exhibit No. 16 — Emsley et al., An Unexpectedly Strong Hydrogen Bond: Ab Initio Calculations and Spectroscopic Studies of Amide-Fluoride Systems, 103 J. Am. Chem. Soc. 47 (1981).

Exhibit No. 17 — Clark and Taylor, I. R. Evidence for a Strong Hydrogen Bond in the Fluoride-Uracil System, J. C. S. Chem. Comm., 1981, at 466.

Exhibit No. 18 — Anderson, Effects of Halides on Reduced Nicotinamide Adenine Dinucleotide Binding Properties and Catalytic Activity of Beef Heart Lactate Dehydrogenate, 20 Bioch. 464 (1981).

Exhibit No. 19 — Imai, Relationship Between Fluoride Concentration in Drinking Water and Dental Caries, 6 Fluoride 248 (1973).

Exhibit No. 20 — Ziegelbecker, Fluoridated Water and Teeth, 14 Fluoride 123 (1981).

Exhibit No. 21 — Ziegelbecker, Natürlicher Fluoridgehalt des Trinkwassers und Karies, 122 GWF Wasser/Abwasser 495 (1981).

Exhibit No. 22 — Bundock, Morin et al., Les Fluorures, la Fluoruration, et la Quatité de l'Environnement, Ministère de l'Environnement, Gouvernement du Quebec, Sainte Foy, 1979.

Exhibit No. 23 — Bundock, Morin et al., Fluorides, Fluoridation, and the Quality of the Environment, Government of Quebec, Sainte Foy, 1979.

Exhibit No. 24 — Lee, Optimal Fluoridation: the Concept and its Application to Municipal Water Fluoridation, 122 West Med. J. (1975).

Exhibit No. 25 — Waldbott, Fluoridation: A Clinician's Experience, 73 So. Med. J. 301 (1980).

Exhibit No. 26 — Waldbott, Mass Intoxication from Accidental Over-Fluoridation of Drinking Water, 18 Clin. Tox. 531 (1981).

Exhibit No. 27 — Physician's Desk Reference, 33rd Ed. 1978, p. 1692.

Exhibit No. 28 — Curriculum Vitae of Dr. Pierre Morin.

Exhibit No. 28A— Calculations on Indirect-Method Adjustment of the Basic Data for Age, Race, and Sex.

Exhibit No. 29 — Calculations on Indirect-Method Adjustment of the Basic Data for Age, Race, and Sex, published in 2 Health Action, Nos. 11-12, pp. 24-25.

Exhibit No. 30 — National Academy of Sciences, Fluorides, Washington, D. C., 1971.

Exhibit No. 31 — Maurer and Day, The Non-Essentiality of Fluoride in Nutrition, 62 J. Nutr. 561 (1957).

Exhibit No. 32 — Doberenz, Mineral Fluoride Diet and Effect on Rats, 22 Fed. Proc. 554 (1963).

Exhibit No. 33 — Tao and Suttie, Evidence for a Lack of an Effect of Dietary Flouride Level on Reproduction in Mice, 106 J. Nutr. 1115 (1976).

Exhibit No. 34 — Weber and Reid, Effect of Low Fluoride Diets Fed to Mice for Six Generations, in Trace Element Metabolism in Animals - 2, University Park Press, Baltimore, 1977, p. 707 ff.

Exhibit No. 35 — Rosenzweig, Dentition of Bedouins in Isreal: I Epidemiology, 47 J. Dent. Res. 407 (1968).

Exhibit No. 36 — Neuman and Disalvo, Caries in the Otomi Indians of Mexico, 24 N.Y. State Dent. J. 63 (1958).

Exhibit No. 37 — Sheihan, Prevalence of Dental Caries in Nigerian Populations, 123 Brit. Dent. J. 144 (1967).

Exhibit No. 38 — Editorial, Sodium Fluoride for Osteoporosis - Some Unanswered Questions, 243 JAMA 463 (1980).

Exhibit No. 39 — Yiamouyiannis, Fluoridation and Cancer, 2 Health Action, No. 20, p. 20 ff.

Exhibit No. 40 — Massler and Schour, Relation of Endemic Dental Fluorosis to Nutrition, 44 JADA 156 (1952).

Exhibit No. 41 — Leone et al., Medical Aspects of Excessive Fluoride in a Water Supply, 69 Pub. H. Rep. 925 (1954).

APPENDIX E

SAFE WATER FOUNDATION OF TEXAS V.
CITY OF HOUSTON,
DISTRICT COURT OF TEXAS, HARRIS COUNTY,
151st JUDICIAL DISTRICT, NO. 80-52271

LIST OF DEFENDANT'S EXHIBITS

Exhibit No. 1 — Map showing low income areas within the City of Houston.

Exhibit No. 2 — Map showing poverty areas within the City of Houston.

Exhibit No. 3 — Map showing the distribution of the surface water supply and natural fluoride levels within the City of Houston.

Exhibit No. 4 — Certified copy of the Texas Dept. of Health's "Drinking Water Standard Governing Drinking Water Quality and Reporting Requirements for Public Water Supply Systems."

Exhibit No. 5 — Curriculum Vitae of Dr. Carlos Lozano.

Exhibit No. 6 — National Interim Primary Drinking Water Regulations, 40 C.F.R. §§ 141.11 et seq.

Exhibit No. 7 — Disclaimer by Minister of the Environment added to Plaintiff's Exhibit 22-23.

Exhibit No. 8 — J. David Erickson, "Down Syndrome, Water Fluoridation, and Material Age," 21 Teratology 177 (1980).

Exhibit No. 9 — Letters to the Editor by Dr. Lee and Dr. Erickson, New England Journal of Medicine, 1978.

Exhibit No. 10 — Ernest Newburn, "Water Fluoridation and Dietary Fluoride Ingestion," 122 The Western Journal of Medicine, 437 (1975).

Exhibit No. 11 — Ernest Newburn, "The Safety of Water Fluoridation," 94 Journal of American Dental Association, 301 (1977).

Exhibit No. 12 — J. David Erickson, "Mortality in Selected Cities with Fluoridated and Non-Fluoridated Water Supplies," 298 New England Journal of Medicine (1978).

Exhibit No. 13 — "Population Drinking Fluoridated Water by County and City, Within State."

Exhibit No. 14 — "Systems in Texas Fluoridated by Grant Funds 1979-1981."

Exhibit No. 15 — "Texas Fluoridation Project Grant Accomplishments, 1979-1981."

Exhibit No. 16 — Letter, September, 1979, by David Crombie, National Minister of Health.

Exhibit No. 17 — List of international organizations supporting fluoridation.

Exhibit No. 18 — Curriculum Vitae of Dr. Kenneth Madsen.

Exhibit No. 19 — Selt-teaching course outline entitled "Fluoride (module) by Steiger, Madsen and Montgomery," (1979).

Exhibit No. 20 — Reprint of Article by Schamshula and Barnes, "Fluoride and Health: Dental Cavies, Osteoporosis, and Cardiovascular Disease," from 1 Annual Review of Nutrition, 427 (1981).

Exhibit No. 21 — "Fluoride" in the National Research Council, Recommended Dietary Allowances (1980), pp. 156-159.

Exhibit No. 22 — Schematic diagram illustrating pathway for placing fluoride solution into surface water at Clinton Drive Plant.

Exhibit No. 23a et seq. — Photos of Fluoridation equipment to be used by City of Houston.

Exhibit No. 24 — Shannon, I. L. Do Adults Derive Significant Benefit from Waterborne or Topically Applied Fluorides? Alaska Dent. Hyg. Assn. J.

Exhibit No. 25 — Shannon, I. L. and West, D.C. Prevention of Decalcification in Orthodontic Patients. Ped. Dent.

Exhibit No. 26 — Shannon, Ira L. The Fluoride Concentration in Drinking Water of

Fluoridating Communities in Texas. Texas Dental J. 96:10-12, 1978.

Exhibit No. 27 — Trodahl, J. N. and Shannon, I. L. Water Fluoridation and Cancer. J. Houston Dist. Dent. Soc. 8:7-16, 1978.

Exhibit No. 28 — Shannon, Ira L. Sucrose - The Tooth's Mortal Enemy; Fluoride - The Tooth's Best Friend. J. Dent. Child, 44:429-437, 1977.

Exhibit No. 29 — Shannon, Ira L. and Sorenson, Stephen L. Houston: A City Divided. Texas Dent. J. 96:14-15, 1978.

Exhibit No. 30 — Shannon, I. L. Facts About Fluoridation. A Symposium sponsored by Rice University, Dr. John Margrave, Chairman. Rice University Press, Houston, Texas, 1974. pp. 36-42.

Exhibit No. 31 — Shannon, I. L. The Status of Water Fluoridation in Houston. J. Houston Dist. Dent. Soc. 49:17-19, 1977.

Exhibit No. 32 — Shannon, I. L. Further Decreases in Fluoride Content of the Fluoride-Deficient Houston Water Supply. J. Houston Dist. Dent. Soc. 47-6-11, 1975.

Exhibit No. 33 — Shannon, I. L. and Wescott, W.B. The Physician and Water Fluoridation in Arkansas. J. Ark. Med. Soc. 69:357-361, 1973.

Exhibit No. 34 — Shannon, I. L. Fluoride Levels in the Drinking Water of South Houston. J. Houston District Dental Soc., 43:7-11, 1971.

Exhibit No. 35 — Shannon, I. L. Fluoride Concentration in the Houston Water Supply. J. Houston District Dental Soc., 42: 7-12, 1970.

Exhibit No. 36 — Curriculum Vitae of Dr. Ira L. Shannon.

Exhibit No. 37 — Curriculum Vitae of George R. Kerr, M.D.

Exhibit No. 38 — Certified copy of minutes of City Council for Tuesday, July 1, 1980.

Exhibit No. 39 — Certified copy of minutes of City Council for Tuseday, July 8, 1980.

Exhibit No. 40 — Certified copy of Council Motion 80-3500 and Transmittal Memo from Dr. James Watson dated June 27, 1980.

Exhibit No. 41 — Underwood, E. J., "Trace Elements," in Toxicants Occurring Naturally in Foods, Committee on Food Protection - Food and Nutrition Board - National Research Council, National Academy of Sciences, pp. vi-vii, 72-74, 78-87, 605 (1973).

Exhibit No. 42 — DHEW Publication No. (HRA) 75-1626, "Decayed, Missing, and Filled Teeth Among Youths 12-17 Years, United States".

Exhibit No. 43 — Davies, G. N., "Cost and Benefit of Fluoride in the Prevention of Dental Caries," World Health Organizations (1974).

Exhibit No. 44 — Nelson, W. and Swint, J. M., "Cost Benefit Analysis of Fluoridation in Houston, Texas," 36-2 Journal of Public Health Dentistry 88 (1976).

Exhibit No. 45 — Hilleboe, H. E., et al, "Newburgh-Kingston Caries-Fluorine Study: Final Report," 52-3 The Journal of the American Dental Association 290 (1956).

Exhibit No. 46 — Lemke, C. W., Doherty, J. M., and Arra, M. C., "Controlled Fluoridation: The Dental Effects of Discontinuation in Antigo, Wisconsin," 80 The Journal of the American Dental Association 782 (1970).

Exhibit No. 47 — Brown, H. K. and Poplove, M., "Brantford - Sarnia - Stratford Fluoridation Caries Study: Final Survey, 1963," 31-8 Journal of the Canadian Dental Association 505 (1965).

Exhibit No. 48 — Beal, J. F. and Clayton, M., "Fluoridation, A Clinical Survey in Corby and Scunthorpe," The Society of Community Medicine (1981).

Exhibit No. 49 — Richards, G. A. and Ford, Joyce M., Cancer Mortality in Selected New South Wales Localities with

Fluoridated and Non-Fluoridated Water Supplies," 2 Australia 521 (1979).

Exhibit No. 50 — Taves, D. R., "Claims of Harm from Fluoridation," in Johansen, E., Taves, D. R., and Olsen, T. O., eds., Continuing Evaluation of the Use of Fluorides, Westview, pp. 295-321 (1979).

Exhibit No. 51 — Curriculum Vitae of Guy R. Newell, Jr., M.D.

Exhibit No. 52 — Newell, Guy R., Statement on Relationship of Fluoridation of Drinking Water to Cancer (1982).

Exhibit No. 53 — Upton, M. D., Arthur C., Statement on Relationship of Fluoridation of Drinking Water to Cancer before the Intergovernmental Relations and Human Resources Subcommitte, House Committee on Government Operations (September 21, 1977).

Exhibit No. 54 — Office of Scientific Reports of the National Institute of Dental Research (National Institutes of Health) and the Dental Disease Prevention Activity (Centers for Disease Control), "Summary of Studies and Evaluations since 1976 Refuting Allegations of an Association between Cancer and Water Fluoridation," (1981).

APPENDIX F

NO. 80-52271

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

SAFE WATER FOUNDATION OF TEXAS, ET AL

v.

CITY OF HOUSTON

OPINION

This is a case of first instance which requires this trial court to interpret the intent of the legislature in writing Article 4471-1, Section 10(a), TEXAS REVISED CIVIL STATUTES ANNONTATED, and also to interpret the exercise of the police power by the City of Houston, delegated from the State, to pass Motion No. 80-3500 and Ordinance No. 80-2530.

Ordinance No. 80-2530 was passed August 12, 1980, after public hearings before City Council. It was passed pursuant to Article XI, Section 5 of the Texas Constitution and Article 1175, TEXAS REVISED CIVIL STATUTES ANNOTATED. The Ordinance authorized the City to add fluoride to the surface water used for public consumption on the East side of the City.

On November 7, 1980, Plaintiffs here filed this cause of action for injunctive relief. No relief was granted, nor was it denied. Instead the City was instructed not to implement the Ordinance unless it gave twenty-four hours notice to Plaintiffs. The City gave public notice that it

would commence adding hydrofluosilicic acid to its drinking water on January 3, 1982. On January 4, 1982, Plaintiffs applied for a Temporary Restraining Order. After telephonic notice to the City Attorney's office, a hearing was held before the Presiding Judge of this Court, and, after oral testimony, the relief was granted.

The subject cause came to trial on the merits on January 13, 1982 and evidence was taken through January 27, 1982. Four witnesses, all scientists, testified for Plaintiffs in their case in chief and a fifth as a rebuttal witness. Nine witnesses, most scientists, testified for the Defendant. Forty exhibits were admitted for Plaintiffs and fifty-two, some with sub-parts, for Defendant.

All the Plaintiffs' witnesses were well educated, erudite, well read, well prepared, and most had testified several times before courts and other bodies. Most of Defendant's witnesses had never read *any* "anti-fluoridation" literature and one had not read any since 1977.

Plaintiffs argued that Ordinance violated the terms of Article 4477-1, Section 10(a), because fluoridated water is *not* free of deleterious matter, and asked that the Ordinance be declared void and in contravention of the Constitutions of this State and of the United States.

Plaintiffs' witnesses testified that many laboratory tests and many studies had been conducted, in many cities in this and other countries, that proved that injuries, including cancer deaths, were caused from consuming fluoridated water. The same experts testified that dental caries is not reduced by the ingestion of fluoridated water.

Defendant's witnesses, some prepared, testified that the Plaintiffs' studies were inconclusive, that many organiza-

tions had endorsed fluoridation in water, that fluoridated water did not increase cancer death rates and that fluoridated water was instrumental in the decrease of dental caries.

Witnesses for both sides disagreed on whether fluoride is an essential nutrient, on how much fluoride we ingest from other sources, such as the air, soft drinks, beer, food, etc. and on the dangers of chronic toxicity.

A witness for Defendant testified that fluoridation is the most economic thing the City can do for the prevention of tooth decay. Another witness for the Defendant testified that fluoride is "the best bargain we can get". The subject of fluoridation of water should *not* and is *not* being considered by this Court on the basis of economy or bargains.

This Court has received many letters (and will undoubtedly receive more after this Opinion) stating that the government does not have the right to force medication on its citizens. The cold fact is that this legal theory has already been decided against the citizens in many cases. The compulsory Small Pox vaccination cases are directly in point. The fact that there is no absolute right of an individual to control over his or her body has also been decided. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

Plaintiffs' witnesses were silent as to why they had not, in over thirty years of fluoride litigation, forced the issue with those guardians of the Federal Government, the Food and Drug Administration and the Federal Trade Commission, considering the extravagant claims of the toothpaste industry as to the "effectiveness" of fluoride

agents (in the various brands) in decay prevention. No evidence was presented showing a challenge before the mentioned Federal agencies on the toxicity of fluoride before the FDA or on false advertising before the FTC. This was one of Plaintiffs' weakest points; just as the lack of knowledge and preparation by six of Defendant's nine witnesses was the latter's weakest point.

There did appear to be an agreement that the water in Houston's West side, being naturally fluoridated, was in all probability hard water and therefore contained various minerals. A Plaintiff witness testified that water hardness tended to counteract the absorption of fluoride through the walls of the stomach and intestinal tract. The same witness testified that water which is artificially treated tends to be softer and the fluoride is then readily absorbed. Both sides agreed that the surface water of Houston (mainly in the eastern portion of the City) is low in mineral content.

An injunction is a form of equitable relief. Plaintiffs always have the burden. In matters involving injunctive relief, Plaintiffs have a very large burden. In matters where Plaintiffs seek to have a Statute or Ordinance declared unconstitutional, and/or null and void, or to question the police powers of a state or governmental subdivision thereof, the Plaintiffs have the greatest burden of all.

Section 10 (a) of Article 4471-1 states as follows:

> "All drinking water for public use shall be free from *deleterious* (emphasis is this Court's) matter and shall comply with the standards established by the State Department of Health or the United States Public Health Service."

Plaintiffs state that fluoridated water is not free of deleterious matter. Deleterious, according to Webster, means harmful to health, well being, injurious, etc. It implies slower, less irreparable injury to the health. This Court finds the word "deleterious" to be vague subject to various definitions and interpretations. This Court has no idea as to the testimony in hearings (if any) before the 49th Texas Legislature, which passed Article 4471-1 in 1945.

As previously stated, in this type of judicial proceeding, Plaintiffs burden is enormous.

The questions to be considered are:

1. Did the Texas Legislature act unreasonably or arbitrarily in passing Article 4477-1, Section 10 (a)?

2. Did the Texas Legislature, by passing said article, delegate (i.e. authorize) to municipalities, such as Houston, the power to add fluoride to the drinking water?

3. Did the City have the police powers to pass and implement ORDINANCE 80-2530?

4. Did the City, in passing said ORDINANCE, act in a capricious or arbitrary manner?

5. Is fluoride a deleterious material?

6. Was there any controversy or difference of opinion, in the nation, on fluoridation of drinking water, when Article 4477-1, Section 10 (a) was passed?

7. Was there any controversy or difference of opinion, in the nation, on fluoridation of drinking water when ORDINANCE 80-2530 was passed?

The Supreme Court of the United States, in *Jacobsen v. Commonwealth of Massachusetts,* 197 U.S. 22, 25 S.Ct. 358, 49 L.Ed. 643 (1905), involving smallpox vaccination, stated:

> "We must assume that when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them . . . It is no part of the function of a court or a jury to determine which one of the two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in light of all the information it could obtain."

In *Smith v. Davis,* 426 S.W.2d 827 (Tex. 1968) then Justice, now Chief Justice Greenhill, said for the majority:

> "In passing upon the constitutionality of a statute, we begin with a presumption of validity. It is to be presumed that the Legislature has not acted unreasonably or arbitrarily; and a mere difference of opinion, where reasonable minds could differ, it is not a sufficient basis for striking down legislation as arbitrary or unreasonable."

In *City of Houston v. Johnny Franks Auto Parts,* 480 S.W.2d 774 (Tex. Civ. App.—Houston (14th Dist.) 1972, writ ref'd, n.r.e.) Chief Justice Tunks stated:

> "The courts cannot interfere unless it appears that the ordinance represents a clear abuse of municipal discretion. And the 'extraordinary burden' rests on one attacking the ordinance to show that no conclusive, or even controversial or issuable, facts or conditions existed which would authorize the governing board of the municipality to exercise the discretion confided to it."

The record is silent as to any hearing before the 49th Legislature in this matter. It is also silent as to what controversy, if any, existed on fluoridation in 1945. Yet, under the opinions in both *Jacobsen v. Commonwealth, supra* and *City of Houston v. Johnny Franks, supra,* this Court must "assume" and must not "interfere" with the thought processes of both the 49th Legislature and the City Council.

As to any controversies on the fluoridation of drinking water in 1980, that is a simpler question.

The answers to the above questions, therefore, must be:

1. This Court must *assume* the Texas Legislature did not act unreasonably or arbitrarily.

2. Yes, the Legislature did delegate this power to the City.

3. Yes, the City did have these police powers.

4. This Court must *assume* the City did not act in a capricious or arbitrary manner in passing Ordinance No. 80-2530.

5. The testimony was not overwhelming on either side as to whether fluoride is a deleterious matter,

particularly since the definition of deleterious is vague.

6. The record is silent as to controversy on fluoride in 1945.

7. Yes, in 1980, there was well publicized and wide spread controversy on the subject of fluoridation of drinking water.

Dr. Burk, Plaintiffs' lead off witness, has held many prestigious teaching positions and has written many scientific papers. He has also received an award from a European Medical Society for his studies on cancer. He testified for one and a half days. Yet, this witness, discussing whether artificial fluoridation causes or contributes to the cause of cancer, admitted not knowing whether existing neoplasms are aggravated or the disease is induced de novo. A "linkage" with cancer or an "association" with cancer is less than overwhelming evidence.

As stated on the bottom of page 4 and the top of page 5, the Plaintiffs in this case have an exceedingly great burden. Courts do not lightly declare statutes or ordinances unconstitutional or null and void.

The presiding judge of this Court is a Constitutionalist judge and not a legislative judge. This Court has carefully reviewed the testimony of all the witnesses, the contents of the exhibits, the briefs submitted by both sides and the cases cited in this opinion as well as cases cited by both sides.

Plaintiffs had the burden to introduce overwhelming evidence in this case. Plaintiffs had to prove that no

rational relationship exists between fluoridation of City surface water and the public health. Plaintiffs had to prove that no controversial facts exist which would authorize fluoridation of the City's surface water. Plaintiffs had to prove that the City acted capriciously and arbitrarily in exercising its police power. Plaintiffs had to prove all these points by overwhelming evidence.

This Court must follow the doctrine of *stare decisis.* Case law, according to *Roe v. Wade, supra, Jacobsen v. Commonwealth, supra, City of Houston v. Johnny Franks, supra* and *Smith v. Davis, supra,* is against Plaintiffs.

Plaintiffs have not been able to overcome their enormous burden and, accordingly, Plaintiffs' Petition for Permanent Injunctive Relief is DENIED.

ANTHONY J. P. FARRIS
Judge Presiding
February 22, 1982

APPENDIX G

NO. 80-52271

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

SAFE WATER FOUNDATION OF TEXAS, ET AL

v.

CITY OF HOUSTON

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Plaintiffs are residents and taxpayers of the City of Houston, and of Harris County, Texas.

2. Pursuant to City Ordinance No. 80-2530 passed on August 12, 1980, following entry of the Opinion of this Court dated February 22, 1982, the Defendant has commenced artificial fluoridation of the surface water used for public consumption on the east side of the City of Houston, and sold in varying amounts for public consumption in other communities of this State, including Nassau Bay, Pasadena, Galveston, League City, Clear Lake, Webster, and Hitchcock. Said treatment of drinking water for public use is accomplished by the addition of hydrofluosilicic acid, so as to bring the fluoride content thereof up to an average level of 0.9 parts per million.

3. Dental caries, or tooth decay, is a widespread human disease and is a serious health problem in Houston, Texas, particularly in low-income areas.

4. Fluoridation by the addition of hydrofluosilicic acid to the surface water supply of the City of Houston at level of concentration of one part per million (1 ppm) may be beneficial as a preventive of dental caries.

5. The considerable amount of evidence introduced, heard and considered by this Court at the trial of this cause on January 13, 14, 15, 18, 19, 20, 21, 22, 25, 26 and 27, 1982, shows that the people of Houston already consume certain amounts of fluoride from other sources; that the artificial fluoridation of public water supplies, such as is contemplated by City Ordinance No. 80-2530, may cause or may contribute to the cause of cancer, genetic damage, intolerant reactions, and chronic toxicity, including dental mottling, in man; that the said artificial fluoridation may aggravate malnutrition and existing illnesses in man; and that the value of said artificial fluoridation is in some doubt as to the reduction of tooth decay in man.

6. The prevention of dental caries contributes to the overall health of the general public.

7. The prevention of dental caries is a legitimate governmental concern.

8. On the other hand, the evidence adduced at this trial shows that the question of artificial fluoridation of public water supplies is subject to earnest and learned controversy; and there is a body respectable scientific and medical opinion which ardently disputes the evidence hereinabove mentioned, and holds artificial fluoridation to be effective in the reduction of dental caries, safe and without harmful effects to man, and economical as a public health measure. While much of the evidence heard

by the undersigned weighs against the said body of opinion, the Houston City Council relied thereon in good faith, and therefore did not act in an arbitrary, capricious and unreasonable manner in enacting the said Ordinance No. 80-2530.

9. The issue of the existence of any potential harmful effects due to the fluoridation of the surface water supply of the City of Houston at a level of 1 ppm is the subject of scientific debate and controversy.

10. The City Council of the City of Houston was aware of the scientific and medical controversy regarding the alleged harmful effects of fluoridation and regarding its Ordinance No. 80-2530.

11. Any Finding of Fact which is deemed a Conclusion of Law is so adopted.

CONCLUSIONS OF LAW

1. The Plaintiffs have standing to sue in this Court as proposed in their Second Amended Original Petition.

2. The State of Texas is not an indispensible party to this suit; even if the contrary were true, the Motion to Dismiss made by Defendant on January 13, 1982, and premised on said contention, was barred by laches.

3. The fluoridation of the City of Houston's surface water supply is a valid exercise of the police power and does not infringe upon any fundamental rights secured to the Plaintiffs under the State or Federal Constitutions.

4. Ordinance 80-2530 does not violate Article 4477-1, Section 10(a), Tex. Rev. Civ. Stat. Ann.

5. The regulations of the Texas Department of Health, issued pursuant to Federal standards and Article 4477-1, Tex. Rev. Civ. Stat. Ann., authorizes the addition of fluoride to the public water supply at a level of up to and including 1.44 ppm.

6. Ordinance 80-2530 is a valid exercise of the police power of the City of Houston.

7. Any Conclusion of Law which is deemed a Finding of Fact is so adopted.

Done in the City of Houston, Texas on the 24th day of May, 1982.

Anthony J. P. Farris, Judge

APPENDIX H

AFFIRMED AND OPINION FILED SEPTEMBER 22, 1983

COURT OF APPEALS
First Supreme Judicial District

OPINION

NO. 01-82-0359-CV

SAFE WATER FOUNDATION OF TEXAS, ET AL,
Appellants

v.

CITY OF HOUSTON,
Appellee

Appeal from the 151st District Court
of Harris County, Texas

Trial Court Cause Number 80-52271

This is an appeal from a judgment denying the appellant's petition for permanent injunction to prohibit the City of Houston (City) from injecting fluoride into its water supply.

The Houston City Council (Council) held public hearings at which it received views of interested citizens concerning the issue of injecting fluoride into the City's surface water supply. On July 8, 1980, the Council passed

Ordinance No. 80-2530 adopting the recommendation by Dr. James Watson, Director of the City of Houston Health Department, that fluoride, in a concentration of one part per million (1 ppm), be added to the City's surface water supply.

The appellants filed suit seeking an injunction to permanently enjoin the City from injecting fluoride into its drinking water. The appellants were granted a temporary restraining order until a hearing could be held. By consent of the parties, the hearing on the temporary injunction was combined with the trial on the merits. On January 13, 1982, the trial court entered judgment that the appellants take nothing. The appellants' appeal raises seven points of error. The appellee has filed one cross-point of error.

In points of error one through four the appellants argue that the trial court erred (1) in holding them to a higher degree of proof than a preponderance of the evidence; (2) in failing to enter judgment in the appellants' favor based on findings of fact made by the court; (3) in failing to enter proper findings of fact; and (4) in failing to find that hydrofluosilic acid, as proscribed by the subject ordinance, constituted a "deleterious matter" as set forth in Tex. Rev. Stat. Ann. art. 4477-1, § 10(a) (Vernon 1976). Such a finding, the appellants contend, would have entitled them to a judgment as a matter of law. These four points of error will be discussed jointly.

Council, the legislative body of the City, has both the authority and responsibility to determine, as a matter of fact, whether injecting fluoride into the City's water supply is an act in furtherance of the public's health,

safety, and welfare. *City of Houston v. Johnny Frank's Auto Parts,* 480 S.W.2d 774 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.). Council must first decide the necessity and reasonableness of the ordinance. *John v. State,* 577 S.W.2d 483 (Tex. Crim. App. 1979).

A court will not substitute its discretion for that of the governing body of a city. *City of Abilene v. Woodlock,* 282 S.W.2d 736 (Tex. Civ. App.—Eastland 1955, writ ref'd, 76 S.Ct. 782). Although reasonable minds may differ as to whether a particular ordinance is an act in furtherance of the public's health, safety, and welfare, this is no indication in the case at bar that the City clearly abused its discretion. *John, supra; City of Abilene, supra.*

An ordinance is presumed to be valid, with the burden of showing its invalidity resting on the party attacking it. When a city government passes an ordinance that is final and conclusive, it cannot be revised by the courts unless the passing of the ordinance was arbitrary, unreasonable, and a clear abuse of power. *Town of Ascarate v. Villalobos,* 148 Tex. 254, 223 S.W.2d 945 (Tex. 1949); *City of Clute v. Linscomb,* 446 S.W.2d 377 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ).

In the case before us, it appears that the appellants are laboring under the mistaken belief that they must only make proof by a preponderance of the evidence that the injection of fluoride into the City's water system in the amount proposed by City would be harmful. Indeed, this was the quantum of evidence that the appellants presented, both lay and scientific. The appellants' burden was to prove that the City, in the exercise of its police

power, has acted arbitrarily, unreasonably and capriciously in making the decision to fluoridate its water supply. If the trier of fact finds that the municipality did not so act, its legislative determination, as reflected by its ordinances must be accepted by the courts as a valid exercise of its police power. *Smith v. Davis,* 426 S.W.2d 827 (Tex. 1968); *Johnny Franks Auto Parts Company, supra.*

The record herein reflects that Council heard evidence, both pro and con, from interested citizens concerning the effects of injecting fluoride into the City's water supply. Council then passed an ordinance approving the injection of fluoride. The record also shows that at trial the court heard similar evidence and concluded that the Council did not act in a manner that was arbitrary, capricious, or unreasonable.

We hold that the Houston City Council, acting under Article XI, Section 5 of the Texas Constitution, had the authority and responsibility to pass Ordinance Number 80-2530 in furtherance of the public's health, safety, and welfare. There was no proof by the appellants that Council, in doing so, acted in a manner that was arbitrary, unreasonable, and a clear abuse of power. Therefore, the trial court, using this standard, was correct in upholding the validity of the city ordinance, and the court's findings relating to the burden of proof being higher than a preponderance of the evidence were dicta. For this reason the court's omission to make findings as to what constituted "deleterious matter" was harmless. The appellants' first four points of error are overruled.

In their fifth point of error the appellants contend that the trial court erred in not holding that fluoridation of

the City's water supply violated the United States and Texas Constitutions.

Four state courts have previously upheld the constitutionality of fluoridation. In all four cases, the United States Supreme Court has denied certiorari. *Paduano v. City of New York,* 45 Misc.2d 718, 257 N.Y.S.2d 531, *affirmed,* 24 App. Div. 2d 437, 260 N.Y.S.2d 831 (1965), *affirmed,* 17 N.Y.2d 875, 271 N.Y.S.2d 305, 218 N.E.2d 339 (1966), *cert. denied,* 385 U.S. 1026, 87 S.Ct. 754, 17 L.Ed.2d 674 (1967); *Schuringa v. City of Chicago,* 30 Ill.2d 504, 198 N.E.2d 326 (1964); *cert. denied,* 379 U.S. 964, 85 S.Ct. 655, 13 L.Ed.2d 558 (1965); *DeAryan v. Butler,* 119 Ca. App. 2d 674, 260 P.2d 98 (1953), *cert. denied,* 347 U.S. 1012, 74 S.Ct. 863, 98 L.Ed. 1135 (1954); *Dowell v. City of Tulsa,* 273 P.2d 859, 43 A.L.R.2d 445 (Okla. 1954); *cert. denied,* 348 U.S. 912, 75 S.Ct. 292, 99 L.Ed. 715 (1955).

Because the United States Supreme Court has never recognized the fundamental right the appellants are seeking to assert, we find no grounds on which to sustain their fifth point of error and accordingly overrule it.

Points of error six and seven respectively, complain that the trial court erred in holding the word "deleterious" to be vague and also erred in holding that the appellants must prove the unconstitutionality of art. 4477-1. The authorities listed in support thereof, have been considered and analyzed. Although they are exhaustive and scholarly, we do not find persuasive support therein for appellants' burden as mandated by their pleadings. We overrule points of error six and seven.

The City contends by cross-point that the trial court erred in rejecting its pleas in bar and in abatement and by special exceptions, challenging the appellants' standing to maintain this suit because they showed no justiciable interest, alleged no peculiar harm, and demonstrated no legal right to injunctive relief.

The general rule is that where the purpose of a suit is to benefit the general public, and no citizen is to be affected differently from all other citizens as a result of the suit, a private citizen must allege specific damage or damage that is peculiar to him. Otherwise, he lacks a justiciable interest that permits him to institute and prosecute the suit. *Yett v. Cook,* 115 Tex. 205, 281 S.W. 837 (Tex. 1926); *Marshall v. City of Lubbock,* 520 S.W.2d 553 (Tex. Civ. App.—Amarillo 1975, no writ); *City of Abilene v. Shackelford,* 572 S.W.2d 742 (Tex. Civ. App.—Abilene 1978, no writ).

A review of the authorities cited by the appellants shows a gradual trend away from the strict requirements of standing as applied to "special injury" or "justiciable interest". The Supreme Court of Texas has apparently adopted a liberal attitude towards standing generally as shown by its decisions in *Texas Highway Commission v. Texas Association of Steel Importers, Inc.,* 372 S.W.2d 525 (Tex. 1963) and *Touchy v. Houston Legal Foundation,* 432 S.W.2d 690 (Tex. 1968). In *Texas Industrial Traffic League, et al v. Railroad Commission of Texas,* 628 S.W.2d 187 (Tex. App.—Austin 1982), *reversed on other grounds per curiam,* Justice Powers gives an excellent review of the background and present status of the law on standing.

Of further significance is the reasoning of the court in *Housing Authority v. State,* 539 S.W.2d 911 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.). There, the tenants in a low income housing project filed suit to enjoin the City Housing Authority from making certain payments to the commissioners. In holding that the plaintiffs had standing to sue, the court stated at page 915:

> If plaintiffs are denied the right to bring and maintain this action, in effect, all tenants in a public housing project that is constructed . . . will be denied the right to complain . . . Plaintiffs have standing to complain about the alleged unauthorized acts of the Commissioners, and may seek relief in the courts to protect their interest and that of the general public.

The appellants filed suit as "taxpaying residents and consumers" of the City's water supply. They challenged the validity of City Ordinance Number 80-2530, and alleged that the addition of fluoride could cause various injuries. They averred that such injuries were "immediate and irreparable in that some marginal individuals" would suffer ill health immediately.

The appellants' pleadings entitled them to sue not only to protect their individual interests but those of the general public as well. We hold that the appellants had standing to sue and deny the appellee's counter-point.

The judgment of the trial court is affirmed.

/s/ HENRY DOYLE
Henry E. Doyle, Associate Justice

Associate Justices Warren and Duggan also sitting.

Judgment rendered and filed September 22, 1983

APPENDIX I

COURT OF APPEALS
First Supreme Judicial District of Texas
1307 San Jacinto, 10th Floor
Houston, Texas 77002

December 8, 1983

Rockne W. Onstad
Kronzer, Abraham, Watkins & Nichols
800 Commerce
Houston, TX 77002

Hon. James Faulkner
Assistant City Attorney
P. O. Box 1562
Houston, TX 77002

RE: CASE NO. 01-82-00359-CV

STYLE: Safe Water Foundation of Texas et al
V: City of Houston

Please be advised the court today OVERRULED appellant's motion for rehearing in the above referenced cause.

Respectfully yours,

Kathryn Cox

By /s/ MARGIE THOMPSON
Deputy

APPENDIX J

THE SUPREME COURT OF TEXAS
P.O. Box 12248 Capitol Station
Austin, Texas 78711

February 22, 1984

Kronzer, Abraham, Watkins,
Nichols, Ballard & Friend
Mr. Grant Kaiser, Atty.
800 Commerce Street
Houston, Texas 77002

Office of the City Attorney
Mr. F. J. Coleman, City Attorney
Mr. Robert J. Collins, Assistant
City Attorney
P. O. Box 1562
Houston, Texas 77251

RE: C-2681,

SAFE WATER FOUNDATION OF TEXAS ET AL.
vs.
CITY OF HOUSTON

Dear Attorneys:

Today the Supreme Court refused the application for writ of error in the above referenced case with the notation, no reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

By /s/ CLAIRE KEEFE
Claire Keefe, Deputy Clerk

APPENDIX K

THE SUPREME COURT OF TEXAS
P.O. Box 12248 Capitol Station
Austin, Texas 78711

March 21, 1984

Kronzer, Abraham, Watkins,
Nichols, Ballard & Friend
Mr. Grant Kaiser, Atty.
800 Commerce Street
Houston, Texas 77002

Office of the City Attorney
Mr. F. J. Coleman, City Attorney
Mr. Robt. J. Collins, Asst. City Atty.
P.O. Box 1562
Houston, Texas 77251

RE: C-2681

SAFE WATER FOUNDATION OF TEXAS ET AL
vs.
CITY OF HOUSTON

Dear Attorneys:

The Motion for Rehearing in the above referenced case was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

By /s/ BLANCA E. MORIN
Blanca E. Morin, Deputy Clerk

APPENDIX L

IN THE
SUPREME COURT OF TEXAS

NOTICE OF APPEAL NO. C-2681

SAFE WATER FOUNDATION OF TEXAS et al.,
Appellants

v.

CITY OF HOUSTON,
Appellee

To the Said Appellee and Its Counsel, Greeting:

You will please take notice that the said Appellants do hereby take an Appeal, pursuant to 28 U.S.C., Section 1257(2), to the Supreme Court of the United States from the Order of this Court entered on March 21, 1984, the same overruling the Motion of the said Appellants for Rehearing of their earlier Application for Writ of Error.

Dated this 24th day of May, 1984

/s/ JOHN REMINGTON GRAHAM
John Remington Graham*
224 North 5th Street
Brainerd, Minnesota 56401
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/s/ GRANT KAISER
Grant Kaiser
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Attorneys for the Appellants

*Admitted to the Bar of the Supreme Court of the United States on August 5, 1971.

Office Supreme Court, U.S.
FILED
JUL 11 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-2029

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SAFE WATER FOUNDATION OF TEXAS, ET AL,
Appellants

v.

CITY OF HOUSTON,
Appellee

On Appeal From The Supreme Court Of Texas

APPELLEE CITY OF HOUSTON'S MOTION TO DISMISS

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P. O. Box 1562
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JAMES C. FAULKNER
Assistant City Attorney
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NO. 83-2029

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SAFE WATER FOUNDATION OF TEXAS, ET AL,
Appellants

v.

CITY OF HOUSTON,
Appellee

On Appeal From The Supreme Court Of Texas

APPELLEE CITY OF HOUSTON'S MOTION TO DISMISS

COMES NOW the Appellee City of Houston to move that this appeal be dismissed on the ground that no substantial federal question is presented and that this case does not warrant further briefing and oral argument.

STATEMENT OF THE CASE

This is a case involving a challenge to the exercise of a municipality's police power to promote the health,

welfare and safety of its citizenry. Appellants' recitation of the procedural history of this litigation is correct except that they continue their shrill but erroneous assertion that they obtained a fact finding by the trial court that fluoridation is harmful. (Jurisdictional Statement at 4, 6, 7, 13.) Specifically, they declare: "Judge Farris also found as a fact for the record, on the basis of a preponderance of the evidence adduced at trial, that—" and then they offer this excerpt from Finding of Fact No. 5:

> "artificial fluoridation of public water supplies, such as is contemplated by City Ordinance No. 80-2530, may cause or may contribute to the cause of cancer, genetic damage, intolerant reactions, and chronic toxicity, including dental mottling, in man; that the said artificial fluoridation may aggravate malnutrition and existing illnesses in man; and that the value of said artificial fluoridation is in some doubt as to the reduction of tooth decay in man."
> (Jurisdictional Statement at 6.)

Appellants apparently have convinced themselves, based upon this selective and misleading excerpt, that they really prevailed but that the court neglected to enjoin this harmful practice, and that this omission was somehow overlooked by the Texas Court of Appeals and the Supreme Court of Texas. In actuality, Appellants have consistently ignored the beginning language of Finding of Fact No. 5 which states:

> "The considerable amount of evidence introduced, heard and considered by this Court at the trial of this cause on January 13, 14, 15, 18, 19, 20, 21, 22, 25, 26 and 27, 1982, shows that. . . ."

When read in its entirety, Finding of Fact No. 5 is more a comment on the nature and content of the Appellants' evidentiary presentation at trial than a basis for stating Appellants were "successful in securing formal findings of fact of [sic] the record, based on a preponderance of concrete evidence in open court, that artificial fluoridation is harmful or dangerous." (Jurisdictional Statement at 13.) The City of Houston's more limited reading of Finding of Fact No. 5 is supported by the other Findings of Fact, particularly Nos. 4, 8, 9 and 10, and Conclusions of Law Nos. 3 and 6. (Jurisdictional Statement at 29a-32a.) Nowhere in the record is there a basis for concluding that the Appellants were entitled to an injunction as a matter of law. Clearly that was the opinion of the three Courts below that reviewed this matter.

SUMMARY OF ARGUMENT

This appeal should be dismissed for want of a substantial federal question for two reasons. First, Appellants have not shown the invasion of any fundamental rights secured by the United States Constitution. Therefore, this litigation falls under the general standard of review under the Fourteenth Amendment of challenges to the exercise of a municipality's police power. The record below shows no error in the judgments of the lower courts reviewing this challenge. Second, the nature and scope of a municipality's police power is so inextricably tied to issues of state law as to make federal review inappropriate. Absent the invasion of some fundamental federal right, the standard of review in this case under the Fourteenth Amendment is one of a rational relationship between the police power measure and the public health. Throughout the

litigation of the case below, Appellants made a frontal assault on the authority of a municipality to fluoridate its water supply. Therefore, the real thrust of Appellants' claim turns on the police power of a municipality under Texas law and the scope of review in the Texas Courts of a legislative decision to exercise the police power. These are matters of state law and do not present a substantial federal question.

ARGUMENT

I. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THE ABSENCE OF THE INVASION OF A FUNDAMENTAL CONSTITUTIONAL RIGHT.

The right asserted here by Appellants has undergone considerable change, although perhaps not rising to the level of a jurisdictional defect. Before the Texas Court of Appeals, they phrased their claim thus:

> "Appellants urge upon this Court that Appellants' rights of privacy and substantive due process guaranteed by the United States and Texas Constitutions have been violated. The right Appellants now assert, as clearly as it may be articulated, is the right to control the substances which they are in effect forced to consume which threaten their bodily integrity and health." (Brief of Appellant at 23-24.)

Except for changes in nomenclature, the identical phrasing was presented to the Supreme Court of Texas. (Application for Writ of Error at 16-17.) Now, before this Honorable Court, the Appellants attempt to modernize their claim and take up the mantle of environmental litigants, saying:

> "N.B., the question here raised is based, not on an abstract claim of privacy or freedom of choice in health matters, but rather on a judicial finding from considerable scientific evidence of the existence of grave environmental danger." (Jurisdictional Statement at 4.)

This is but another effort in search of some cognizable legal basis for defeating in the courts a legislative decision in favor of fluoridation. The results of some thirty years of litigation have been generally adverse to Appellants' position. The earlier history of fluoridation litigation was aptly summarized by one court:

> "Although no harmful results from fluoridation have been clearly proven and it has no effect upon the color, taste or odor of water and despite the health benefits that are clearly derived, proposals to fluoridate drinking water have encountered extraordinary opposition and antagonism. The generative forces of this hostility are not easily identified but have found expression in a variety of arguments. It is contended, variously, that there is a lack of statutory authority for the municipal action; that even if adequate statutory authority can be inferred, fluoridation is an abusive exercise of police power and as such is constitutionally offensive; that it prohibits the free exercise of religion by imposing medication upon those who would resist it; and that it otherwise constitutes a deprivation of personal liberties. The courts throughout the nation have been virtually unanimous in resisting these as well as other arguments, and in upholding fluoridation of drinking water as a valid public health measure whenever a challenge has been presented. [Extensive citations omitted.]
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> * * *

> "The unanimity of appellate state court holdings is matched only by the frequency and persistent regularity with which the United States Supreme Court has declined review." *Young v. Board of Health,* 61 N.J. 76, 293 A.2d 164, 165-166 (N.J. 1972).

In four cases the Supreme Court declined to grant review by certiorari on decisions of state courts upholding the constitutionality of fluoridation.[1] While the denial of certiorari is not of precedential value *per se,* in five other cases this Court dismissed the appeal for want of a substantial federal question.[2] Such an action by this Court is a decision on the merits, despite its summary nature, and therefore constitutes binding precedent for the lower courts. *Hicks v. Miranda,* 422 U.S. 332 (1975); *Tully v. Griffin, Inc.,* 429 U.S. 68 (1976). Thus, despite numerous opportunities to do so, this Court has never recognized any version of the fundamental right such as Appellants seek to establish. Therefore, it is not surprising, when presented with a direct constitutional challenge, that a Federal District Court observed:

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1. *Paduano v. City of New York,* 45 Misc. 2d 718, 257 N.Y.S. 2d 531, *affirmed,* 24 App. Div. 2d 437, 260 N.Y.S.2d 831 (1965), *affirmed,* 17 N.Y.S.2d 875, 271 N.Y.S.2d 305, 218 N.E.2d 339 (1966), *cert. denied,* 385 U.S. 1026 (1967); *Schuringa v. City of Chicago,* 30 Ill. 2d 504, 198 N.E.2d 326 (1964); *cert. denied,* 379 U.S. 964 (1965); *DeAryan v. Butler,* 119 Cal. App. 2d 674, 260 P.2d 98 (1953), *cert. denied,* 347 U.S. 1012 (1954); *Dowell v. City of Tulsa,* 273 P.2d 859, 43 A.L.R.2d 445 (Okla. 1954), *cert. denied,* 348 U.S. 912 (1955).

2. *Minnesota State Board of Health v. City of Brainerd,* 241 N.W.2d 624 (1976), *appeal dismissed,* 429 U.S. 803 (1976); *Canton v. Whitman,* 44 Ohio St. 2d 62, 337 N.E.2d 766 (1975), *appeal dismissed,* 425 U.S. 956 (1976); *Chapman v. City of Shreveport,* 225 La. 859, 74 So.2d 142 (1954), *appeal dismissed,* 348 U.S. 892 (1954); *Kraus v. City of Cleveland,* 163 Ohio St. 559, 127 N.E.2d 609 (1955), *appeal dismissed,* 351 U.S. 935 (1956); *Birnel v. Town of Fircrest,* 53 Wash. 2d 830, 335 P.2d 819 (1959), *appeal dismissed,* 361 U.S. 10 (1959).

> "Courts, both state and federal, have held with virtual unanimity that the fluoridation of public water systems does not violate the due process clause or constitutional rights incorporated by that clause of the Fourteenth Amendment to the United States Constitution." *Alkire v. Cashman,* 350 F.Supp. 360, 362 (S.D. Ohio 1972), *aff'd* 477 F.2d 598 (6th Cir. 1973), *cert. denied,* 414 U.S. 858 (1973).

Appellants further argue that the courts need not defer to legislative decision-making except in areas of economic regulation. (Jurisdictional Statement at 8.) This view is unsupported by the case law. This Honorable Court's refusal, as a matter of constitutional law, to review the wisdom of legislation is not confined merely to the area of economic regulation but also has included measures designed to protect or enhance public health or safety.[3] Clearly, the standard of review, in the absence of infringement upon a fundamental right, is not whether the legislative body was right or wrong in deciding to fluoridate but rather whether it was deciding a debatable issue concerning the exercise of the police power. This was the correct standard used by the Texas Courts, which

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3. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981) (Ban on retail sale of milk in nonreturnable containers); *Hodel v. Indiana,* 452 U.S. 314 (1981) (Congressional Act requiring reclamation of land subjected to surface mining); *Standard Oil Co. v. City of Marysville,* 279 U.S. 582 (1929) (Ordinance restricting storage of flammable liquids); *Lambert v. Yellowley,* 272 U.S. 581 (1926) (Congressional Act limiting physicians prescribing liquor); *Cusack v. City of Chicago,* 242 U.S. 526 (1917) (ordinance regulating construction and maintenance of billboards); *Price v. Illinois,* 238 U.S. 446 (1915) (State statute prohibiting sale of food preservatives containing boric acid); *Collins v. State of Texas,* 223 U.S. 288 (1912) (State statute governing medical practitioners); *Laurel Hill Cemetery v. City and County of San Francisco,* 216 U.S. 358 (1910) (Ordinance prohibiting burial of the dead within city and county limits); *Jacobson v. Massachusetts,* 197 U.S. 22 (1905) (State statute requiring smallpox vaccinations).

finds its parallel in the rational relationship test under the Fourteenth Amendment.

No court has expanded the fundamental rights of the personal privacy and liberty to encompass the Appellants' claims. While a right of privacy has been recognized in various contexts, this Court has never recognized an absolute right to bodily integrity. *Roe v. Wade,* 410 U.S. 113, 154 (1973); *Schmerber v. California,* 384 U.S. 757, 768 (1966); *Breithaupt v. Abram,* 352 U.S. 432, 439 (1957); *Jacobson v. Massachusetts,* 197 U.S. 22 (1905). Thus, the absence of a fundamental right is fatal to Appellants' claims of a substantial federal question.

II. A MUNICIPALITY'S AUTHORITY TO EXERCISE ITS POLICE POWERS AND THE SCOPE OF REVIEW IN THE COURTS IS ESSENTIALLY AN ISSUE OF STATE LAW.

The City of Houston recognizes that the existence of a federal constitutional issue may be separate and independent from the other state law issues raised in the Courts below. However, Appellants have not demonstrated the infringement of a fundamental constitutional right and consequently the standard of review is that of a rational relationship between the police power measure and its objective. Therefore, this entire litigation actually turns on the authority of a municipality under Texas law to exercise the police power, and the role of the courts in reviewing those legislative decisions. (See opinion of Texas Court of Appeals in Jurisdictional Statement at 34a-36a). Appellants, in essence, argue that *Houston and T.C. Ry. Co. v. City of Dallas,* 98 Tex. 396, 84 S.W. 648 (1905) established the analytical framework

for all Texas police power cases. (Jurisdictional Statement at 12.) Under Appellants' theory, the judiciary is invited to reassess every measure enacted pursuant to a municipality's police power and to determine if the benefits outweigh the potential harm alleged. In *Houston & T.C. Ry. Co.*, the City of Dallas sued the railroad in mandamus to force it to comply with a City ordinance requiring railroads to lower their tracks to grade level where such tracks crossed a public street. The railroad defended by alleging that the City ordinance was invalid because it violated the State constitutional provisions prohibiting the taking or damaging of private property for public use without compensation. (See Article I, § 17 of Texas Constitution.) The Supreme Court of Texas noted that the weight of authority supported the view that a railroad company can be required at its own expense to construct crossings at grade when public safety demanded the change. 84 S.W. at 652. That Court, however, was of the opinion that the railroad was entitled to a hearing on the benefit to the public compared to the burden placed on the railroad. Obviously, the benefit to the general public must be examined *vis-a-vis* the detriment to the individual property owner in order to measure whether or not a municipal police power regulation would reach the level of taking private property for public use without compensation. *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978). Because there is no comparable issue of "taking" of Appellants' property, the analysis from *Houston & T.C. Ry. Co* is inapplicable. *Cf. Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978). The balancing technique that Appellants urge is merely an invitation for the courts to perform a legislative rather than a judicial function

in determining the wisdom and desirability of municipal public health measures and similar exercises of the police power. *City of Weslaco v. Melton*, 158 Tex. 61, 308 S.W.2d 18 (1957).

Appellants' arguments (Jurisdictional Statement at 10-11) regarding the trial court's alleged mistake in assessing their burden of proof clearly demonstrate their erroneous conception of the nature of this litigation. They seek to have the judiciary set aside a legislative decision of the City Council of the City of Houston. The evidence which they presented to the trial court and the arguments they make here suggest they believed that the trial court was empowered to decide whether or not the City of Houston should fluoridate its water supply. That was *not* the question before the trial court, nor is it a question this Honorable Court is to resolve. The decision to fluoridate was made by the duly elected officials who are charged with making legislative decisions for the City of Houston. The question presented at trial, and on appeal, is the same question of Texas law that is presented whenever a plaintiff challenges a municipality's exercise of its police power: whether or not the City Council acted in an arbitrary, capricious and unreasonable manner in making the decision it made. *Town of Ascarate v. Villalobos*, 148 Tex. 254, 223 S.W.2d 945, 950 (1949). This is the same test used under the Fourteenth Amendment in applying the rational relationship concept to challenges such as this. To go beyond a rational relationship review in the absence of a fundamental right, as Appellants seem to urge, would require this Honorable Court to explore the intricacies of Texas law governing the powers of its municipalities.

As a Home Rule City under Article XI, Section 5, of the Texas Constitution, the City of Houston has the power to provide for the health, safety and welfare of its residents. *See, generally,* TEX. REV. CIV. STAT. ANN. art. 1175; Article II, Section 2 of the City Charter of the City of Houston. Under its police power, the City has the authority and responsibility to determine when to act in the furtherance of the public health, safety and welfare. *City of Houston v. Johnny Franks Auto Parts Company,* 480 S.W.2d 774 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.). While the exercise of this judgment is subject to review by the Texas courts, those challenging the exercise have the extraordinary burden of proving that no controversial or issuable facts or conditions existed which would have authorized the City to exercise the discretion vested in it. *Lubbock Poster Company v. City of Lubbock,* 569 S.W.2d 935 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.), *cert. denied,* 444 U.S. 833 (1979). As the Supreme Court of Texas has recently observed, the burden on a party challenging the police power is indeed a heavy one. *City of Pharr v. Tippitt,* 616 S.W.2d 173, 176 (Tex. 1981). A legislative finding that a condition exists, the control of which is a proper exercise of the police power, must be accepted by the Texas courts as a basis for the validity of the objective of the action if there is any legally sufficient evidence to support such finding. *Smith v. Davis,* 426 S.W. 2d 827 (Tex. 1968); *City of Waxahachie v. Watkins,* 154 Tex. 206, 275 S.W.2d 477 (1955); *City of Houston v. Johnny Franks Auto Parts, supra.*

The decision of the Texas Court of Appeals correctly applied these principles to the City's fluoridation of its water supply, and the Supreme Court of Texas found no

reversible error. It is obvious that the City has a legitimate interest in the health of its residents. Article 1175 (28), TEX. REV. CIV. STAT. ANN., authorizes the City to provide for a health department and to establish rules and regulations for the protection of the public health. Article 4477-1, § 23(a), TEX. REV. CIV. STAT. ANN., disclaims any intention to reduce the City's police power over public health. Indeed, the courts in other jurisdictions have held with virtual unanimity that fluoridation of the public water supply is a valid exercise of the police power. *See Commonwealth of Pennsylvania v. City of Lebanon,* 393 A.2d 381 (Pa. 1978) and the cases collected therein at 385-386.

Appellants' burden under Texas law was to show that there is no rational relationship between the fluoridation of the City's surface water supply and the protection of public health. The fact that fluoridation is the subject of scientific controversy does not remove this matter from the ambit of the City's police power. If reasonable minds could differ as to whether the measure has a substantial relationship to the public health, no clear abuse is shown and it must stand as a valid exercise of the police power in Texas. *City of Waxahachie, supra,* 275 S.W.2d at 481. Appellants' argument seems to be that if, by the preponderance of evidence presented, they proved fluoride may be harmful, they should have prevailed. However, under the case law, it is not a court's function to second-guess a legislative decision on a matter of debate and controversy. Rather, the debate is one to be resolved by the legislative body. The fact that one side or the other presented more of its arguments in that debate to the trial court is immaterial to the question of law to be decided, *i.e.*, whether any "controversial or issuable facts

or conditions existed which would authorize the governing board of the municipality to exercise the discretion confided to it by a valid ordinance in determining a matter of purely governmental policy." *King v. Guerra,* 1 S.W.2d 373, 376 (Tex. Civ. App.—San Antonio 1927, writ ref'd).

In an analogous case, *Zucht v. King,* 260 U.S. 174 (1922), this Court affirmed a Texas decision which held a compulsory vaccination law to be valid against constitutional challenges based on the Fourteenth Amendment to the United States Constitution. This decision relied upon the holding of this Court in *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 22 (1905). *Jacobson* involved the constitutionality of the Massachusetts compulsory smallpox vaccination law as a valid exercise of the police power. Recognizing that there were divergent opinions in the medical profession as to the efficacy of compulsory vaccination as a means of preventing the spread of smallpox, the Court stated:

> "We must assume that when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. . . . It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in light of all the information it could obtain." (197 U.S. at 30.)

The compulsory smallpox vaccination cases are directly analogous to the case at bar. The City Council of the City of Houston was aware of the controversy concerning fluoridation and made its decision on the mode of pro-

tecting public health. (Findings of Fact, Nos. 8, 9, and 10.) The fact that dental caries is not a contagious disease as is smallpox does not destroy the analogy. Courts which have considered this restriction on *Jacobson* have usually rejected it on the basis that the protection of public health applies to the spread of both contagious and noncontagious diseases. *See Kaul v. City of Chehalis*, 45 Wash. 2d 616, 277 P.2d 352 (1954); *Chapman v. City of Shreveport*, 225 La. 859, 74 So.2d 142 (1954), *appeal dismissed*, 348 U.S. 892 (1954).

Appellants' arguments are but yet another invitation to this Honorable Court to make legislative decisions, an invitation it has repeatedly declined. Absent a measure which "trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, alienage," this Court has accorded "wide latitude" to the use of the police power, observing: "In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights not proceed along suspect lines. . . ." *City of New Orleans v. Dukes*, 427 U.S. 297, 303-304 (1976). Indeed, this Court has said: "We do not inquire whether this statute is wise or desirable, or 'whether it is based on assumptions scientifically substantiated.' " *James v. Strange*, 407 U.S. 128, 133 (1972). The issue of fluoridation presents a basic decision concerning the exercise of the municipality's police power. The decision should be made by the legislative body empowered to determine the advantages and disadvantages, not the courts. *Williamson v. Lee Optical*, 348 U.S. 483, 487-488 (1955). Appellants make the assertion that "[t]he nation needs the guidance of this Court to establish the constitutional standards for this

type of litigation." (Jurisdictional Statement at 16.) This Court's decisions just cited provide all the guidance that is necessary. Appellants would reject these constitutional standards and seek to read the anti-fluoridationists' position into the Fourteenth Amendment.

WHEREFORE, PREMISES CONSIDERED, Appellee prays that this appeal be dismissed for want of a substantial federal question and that the alternative request for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Motion to Dismiss have been forwarded to Attorneys for Appellants, John Remington Graham, 224 North 5th Street, Brainerd, Minnesota 56401 and Grant Kaiser, 800 Commerce Street, Houston, Texas 77002, by certified mail, return receipt requested, on this 9th day of July, 1984.

John E. Fisher

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